

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
The Telephone Consumer Protection Act)	
of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

Comments of Staples, Inc.

Staples, Inc. (“Staples”), by and through its attorneys, respectfully submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.¹

Staples is a national retailer of office supplies, business services, furniture, and technology based in Framingham, Massachusetts. Staples is a publicly-traded company employing approximately 40,000 persons nationwide. Like other retailers, Staples uses facsimiles advertisements as part of a comprehensive marketing program to communicate with both existing and potential customers. Staples believes that when performed responsibly, fax advertising, as with other forms of marketing, is an effective and efficient method of interacting with such customers.

**I. The Commission Should Establish a Rebuttable Presumption that a Sender
Acquired a Recipient’s Fax Number Prior to July 9, 2005**

The Junk Fax Prevention Act of 2005² (the “JFPA”), enacted July 9, 2005, amended the Telephone Consumer Protection Act (the “TCPA”) and the

¹ *Notice of Proposed Rulemaking and Order*, FCC 05-206 (released Dec. 9, 2005); 70 Fed. Reg. 75102 (Dec. 19, 2005) (“NPRM”).

² Pub. L. No. 109-21, codified at section 227 of the Communications Act of 1934, 47 U.S.C. § 227.

Communications Act to expressly permit the transmission of unsolicited facsimile advertisements to persons with whom the sender has an “established business relationship,” and reinstated the Commission’s decade-old policy of allowing businesses to send fax communications to their customers without prior written consent.

To the TCPA’s general statutory prohibition on using a telephone fax machine, computer, or other device to send an unsolicited advertisement to a telephone fax machine,³ the JFPA codified an express exemption (a) for senders who have an EBR with the recipient, (b) where the sender obtained the recipient’s telephone fax machine number through either (1) the voluntary communication of such number, within the context of such EBR, from the recipient of the advertisement, or (2) a directory, advertisement, or Internet site to which the recipient voluntarily agreed to make its fax number available for public distribution; and (c) where the unsolicited advertisement contains an “opt-out” notice meeting new statutory requirements.⁴

As the *NPRM* notes, however, the JFPA provides that if the EBR was in existence prior to July 9, 2005, and the sender possessed the fax number prior to that date, the sender is not required to demonstrate how it obtained the fax number.⁵ The *NPRM* proposes to incorporate this exception into the Commission’s rules, and asks how the Commission should verify that a sender had an EBR and fax number prior to July 9, 2005. *NPRM*, ¶ 11.

This issue is significant because of the potential for disagreement between fax senders and recipients that may result in enforcement proceedings or litigation. Such

³ 47 U.S.C. § 227(b)(1)(C).

⁴ JFPA, § 2(a) (codified at 47 U.S.C. § 227(b)(1)(C)(i)-(iii)).

⁵ JFPA, § 2(a) (codified at 47 U.S.C. § 227(b)(1)(C)(ii)); *NPRM* ¶ 11.

fundamental disagreements will require the expenditure of substantial time and money by companies such as Staples that are attempting to comply in good faith with their statutory obligations, as well as by the Commission and the courts, which potentially will be the recipients of intrinsically fact-intensive claims that may have little evidentiary support. Indeed, it is unlikely that either a sender or a recipient will be able to produce paper records documenting the date on which a fax number was obtained or provided. For example, in instances where a fax recipient orally provided its fax number during a telephone conversation with the sender, no physical record of the conversation may exist. At best, there may be nothing more than the entry of a fax number into a database, which, based on the sender's internal procedures and processes, will serve to demonstrate that the customer voluntarily provided its fax number, but will not indicate the date on which the sender obtained the number.⁶ Similarly, it is not difficult to envision disputes arising over when a sender obtained a fax number, even when an EBR existed prior to July 9, 2005, when the fax number was obtained from a publicly available resource.⁷

Consequently, with respect to those instances involving a fax recipient asserting that it received a fax from a sender that did not have the recipient's fax number before July 9, 2005, there should be a presumption that the sender in fact did have the number prior to that date, and the burden of proof should be on the recipient to rebut that presumption. In the absence of the fax recipient's conclusive proof to the Commission that a sender in fact did not possess the recipient's fax number prior to July 9, 2005, the Commission should take no action against the sender. This approach is consistent with

⁶ Staples' database, referred to as CMIS (Customer Marketing Information System), which it has used since 1997, does not specify how a fax number was obtained, or the date on which it was obtained.

⁷ In contrast, it is more likely that the fax sender, recipient, or both will have evidence demonstrating the existence of an EBR, as defined by the Commission's rules.

the legislative history of the JFPA, which instructs that the Commission should not insist on new record keeping or evidence not required under the Commission's prior version of the EBR. *See* S. Rep. No. 109-76, at 6 (2005).

Two limitations on this presumption are appropriate. First, it should be time-limited, as the question of when a fax number was first obtained is likely to diminish in significance over time. Staples suggests a period of at least 24 months from the date of enactment of the JFPA. Thus, until July 9, 2007, senders should be entitled to a presumption that they acquired a fax recipient's fax number prior to July 9, 2005. Second, if the recipient demonstrates that it did not have an EBR with the sender prior to July 9, 2005, the presumption should not apply.

II. The Commission Should Not Limit the Duration of the EBR

In the context of telephone solicitations, both this Commission and the Federal Trade Commission have limited the duration of the EBR to 18 months following a purchase or transaction, and three months following an application or inquiry. The *NPRM* asks whether to place a similar limit on the EBR as applied to unsolicited fax advertisements. *NPRM* ¶ 16.

According to the legislative history of the JFPA, by codifying the definition of EBR that was in the Commission's rules as in effect on January 1, 2003, Congress "specifically exclude[d] the 18/3 time limits that are in the current definition of 'established business relationship' in the C.F.R. (as ordered by the FCC's July 2003 TCPA Order...)." S. Rep. No. 109-76, at 10 (2005). Although Congress granted the

Commission authority to place a time limit on EBRs,⁸ Congress also prescribed specific steps that the Commission must follow before doing so.⁹ Consistent with Congress' intent, the Commission should not limit the duration of an EBR unless and until making the determinations mandated by Congress. Affected parties will be able to address fully this issue only after the Commission has compiled and made available the data specifically required by the JFPA.

III. The Commission Should Establish Minimum Requirements for "Clear and Conspicuous" Notice

The *NPRM* asks whether it is necessary to set out in the rules what constitutes "clear and conspicuous notice." *NPRM* ¶ 20. The Commission should not attempt to establish a "one size fits all" template for what constitutes clear and conspicuous notice. Rather, the Commission should adopt a reasonable safe harbor on which a sender may rely. Unlike other forms of advertising, facsimiles have a nearly uniform printed size of 8½ inches x 11 inches, and typically print in black and white. The Commission should establish a safe harbor consistent with these limitations; specifically, the Commission should treat as "clear and conspicuous" a notice appearing on the first page of a facsimile advertisement formatted to be printed on 8½ x 11 inch paper and in black and white, in at least an eight-point type size. Such a requirement would be similar to Federal Election Commission ("FEC") regulations on what may be considered clear and conspicuous type size for disclaimer text required by the FEC in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches

⁸ 47 U.S.C. § 227(b)(2)(G)(i) (the Commission "may ... limit the duration of the existence of an established business relationship...").

⁹ 47 U.S.C. § 227(b)(2)(G)(i)(I)-(III).

by 36 inches. For communications of this size and smaller, FEC regulations establish a safe harbor that establishes a fixed, 12-point type size as a sufficient type size. *See* 11 C.F.R. § 110.11(c)(2)(i).¹⁰ For a standard, letter size page, eight-point type size should be sufficient to provide “clear and conspicuous notice.”

The *NPRM* also asks what is the shortest reasonable time within which a sender of unsolicited fax ads must comply with a request not to receive future fax ads from the sender. *NPRM* ¶ 20. Staples agrees that 30 days constitutes such a reasonable period, as it will allow sufficient time for companies of all sizes to update their databases. Although Staples strives to implement immediately any do-not-fax request it receives, and usually is able to do so well within 30 days, Staples recognizes that smaller companies may not be able to update their customer records as quickly; 30 days thus strikes a reasonable balance between recipients’ wishes not to receive additional unsolicited advertisements, and companies’ ability to honor those wishes promptly and efficiently.

IV. The Statute Permits Oral Grants of Permission to Send a Facsimile Advertisement

The *NPRM* proposes a definition of “unsolicited advertisement” identical to the definition adopted by the JFPA – generally, an advertisement transmitted to a person without that person’s “prior express invitation or permission, in writing or otherwise.” *NPRM* ¶ 29; JFPA § 2(g) (codified at 47 U.S.C. § 227(a)(5)). The *NPRM* asks what forms of permission should be allowed, in addition to written permission. *NPRM* ¶ 30.

¹⁰ The FEC’s rulemaking considered, but rejected, the possibility of a formula for the font size based on either the largest or smallest font size of other text in the document. Other than the safe harbor for 12 point text in items no larger than 24” x 36”, the rule simply states that “The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication.” 11 C.F.R. § 110.11(c)(2)(i).

Staples believes that the Commission must interpret broadly the language “or otherwise,” which Congress added to the statute through enactment of the JFPA, as the plain meaning of the words support such an interpretation. Clearly, oral permission is encompassed within the words “or otherwise,” and must be permitted.

With respect to disputes over whether oral permission was provided, Staples urges the Commission to adopt a safe harbor, analogous to that provided in the Section 227(c)(5) of the TCPA with respect to telephone solicitations to residential telephone subscribers. Specifically, a demonstration by a fax sender that it has established and implemented, with due care, reasonable practices and procedures to effectively prevent unsolicited facsimile advertisements in violation of the statute and the Commission’s rules, should serve as an affirmative defense to a claim by a recipient that the sender did not have prior permission to send a fax to the recipient.

WHEREFORE, Staples respectfully requests that the Commission adopt rules implementing the Junk Fax Prevention Act consistent with the foregoing comments.

Respectfully submitted,

STAPLES, INC.



E. Ashton Johnston
William H. Minor
DLA Piper Rudnick Gray Cary US LLP
1200 19th Street, N.W.
Washington, DC 20036
(202) 861-3900

G. Perry Wu
Staples, Inc.
500 Staples Drive
Framingham, MA 01702
(508) 253-8322

January 18, 2006